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No. 09-875

In the Supreme Court of the United States

JOSHUA ELI RAFF, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the State violate a defendant's Fifth Amendment "right to remain silent," as applied to the states by the Due Process Clause of the Fourteenth Amendment, by (1) eliciting testimony from a police officer in its case-in-chief that, prior to arrest, the defendant said nothing in response to the officer's questions about a matter unrelated to the charged crimes, and by (2) arguing to the jury such prearrest silence should be considered as substantive evidence of his guilt?

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STATEMENT OF THE CASE

This case concerns three armed robberies committed by petitioner and Casey Bowen in 2006 in Los Angeles County. A jury convicted petitioner of three counts of second degree robbery (Cal. Penal Code § 211) and found that petitioner personally used a firearm in two of the robberies (Cal. Penal Code § 12022.53(b)). The trial court sentenced petitioner to state prison for twelve years.

A. Prosecution's Case-In-Chief

1. The robberies

On May 18, 2006, petitioner robbed Refugio Gomez at gunpoint as the latter was walking home from work in Santa Monica. Gomez initially described the robber as "possibly Hispanic." A few days after the robbery, police officers showed Gomez two photographic lineups. Gomez selected petitioner's photograph as that of the robber but did not identify Bowen's photograph. At the preliminary hearing and at trial, Gomez identified petitioner, and excluded Bowen, as the robber. Gomez identified a gun stolen from Bowen's neighbor, Keshanna Spencer, as the gun used in the robbery.

On May 21, petitioner took Paul Tifford's wallet at gunpoint as the latter was walking to his car. Tifford's wallet contained approximately $20 in cash, as well as three credit cards, an ATM card, a social security card, a health card, and a gift card. The following day, police officers showed Tifford two photographic lineups. He identified petitioner as the person most closely resembling the robber. Tifford also identified petitioner at the preliminary hearing and at trial. He excluded Bowen as the robber.

Tifford identified the gun stolen from Spencer's apartment as the one used in the robbery.

Also on May 21, Bowen took Michael Silverman's wallet at gunpoint on 16th Street in Santa Monica. At the time, Silverman's wallet contained his driver's license, a debit card, and $2 in cash. A few days later, Silverman was shown "a couple" of photographic lineups. He identified Bowen as looking similar to the robber. Silverman also identified Bowen at the preliminary hearing. Silverman stated that petitioner was not the robber. Silverman identified the gun taken from Spencer's apartment as resembling the one used in the robbery.

2. The arrest

On May 21, about one hour after the Silverman robbery, Los Angeles Police Officers David Bambrick and Lilo Miaiva were on patrol in Venice when they observed a car driven by Bowen in which petitioner was a passenger. Officer Bambrick noticed that neither Bowen nor petitioner was wearing a seat belt. The officers made a U-turn and attempted to drive behind the Optima. The Optima accelerated and made several turns. Officer Bambrick saw petitioner leaning toward the open window on the passenger side of the car. The officers followed the Optima, as it ran a stop sign and then continued driving.

The Optima eventually stopped, and the officers initiated a traffic stop. Officer Miaiva asked Bowen for his license and then had him exit the car. Officer Miaiva searched Bowen and found Silverman's driver's license in Bowen's pants pocket. Bowen was placed in the patrol car. In the meantime, petitioner was still inside the Optima and was acting nervously, looking to his left and right. Officer Bambrick approached petitioner and told him to place his hands on the dashboard. Officer Bambrick then told

petitioner to exit the car and asked him, "Hey. What's going on? You know, what's up with the driving?" Petitioner did not respond and just stared straight ahead. Officer Bambrick handcuffed petitioner and placed him in the back of the police car.

Officer Bambrick returned to the area where he had seen petitioner leaning outside the car window during the chase. On the sidewalk, he found a .45-caliber semiautomatic handgun. A magazine containing eight live .45-caliber bullets was found nearby. Spencer later identified the handgun found on the sidewalk as the gun that had been stolen from her apartment.

3. The investigation

Santa Monica Police Detective Michael Bambrick was assigned to investigate this case. Detectives Bambrick and Richard Lewis searched the car and recovered two cellular telephones, some loose paper, cash, a plastic baggie containing what appeared to be marijuana, a car rental agreement from Enterprise in Bowen's name, a piece of notebook paper with writing on it, three grocery store receipts, a black and gray cap, a black hooded sweatshirt, a gray hooded sweatshirt, a camouflage bandanna, and a wallet with a social security card and a medical card in the name Paul Tifford. Tifford later identified the wallet as his.

Detective Bambrick flipped open one of the cellular telephones, which had a screen reading "My phone number is . . . ." Detective Bambrick called the number and heard a voice mail message in petitioner's voice. The message contained profanity and a Spanish phrase. Detectives Bambrick and Lewis reviewed the text messages stored in petitioner's cellular telephone. One of the messages

sent at 8:44 p.m. on May 21, 2006, stated, "Just a debit card, like, three. That's all they got. Pinche Putos."[1] The second cellular telephone that was recovered belonged to Bowen. The notebook paper found in the glove compartment had directions on it. The directions ended at a location close to where the Tifford robbery occurred. After petitioner and Bowen's arrest on May 21, 2006, there were no more similar robberies committed in Santa Monica.

Detective Bambrick had several conversations with Deborah Raff, petitioner's mother. Detective Bambrick informed Deborah about the crimes. Deborah never mentioned petitioner was home with her on May 18, 2006.

B. Defense Case

According to petitioner's mother, he was home in Santa Monica at the time of the robberies.

C. Factual Background and Court Rulings As to the Constitutional Issue Presented

In his case-in-chief, the prosecutor questioned Officer Bambrick about the circumstances of the traffic stop of the vehicle in which petitioner was a passenger. (Pet. App. 25-26.) The officer testified that, after getting petitioner to exit the car, he asked petitioner, "Hey. What's going on? You know, what's up with the driving?" (Pet. App. 26.) When the prosecutor asked, "And What, if anything, did he say?" Defense counsel objected and then asked for a sidebar hearing. (Pet. App. 27.)

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[1] "Pinche Puto" means "fucking ass hole," "fucking mother fucker," or ""fucking fag" in Spanish.

At sidebar, the prosecutor noted petitioner did not respond to the questions and would not even look at the officer. (Pet. App. 27.) When defense counsel objected on *Miranda* grounds, the trial court pointed out that petitioner was not in custody and was not interrogated and that the officer's "preliminary investigatory" questions were not designed to elicit an incriminating response. (Pet. App. 27-28.) As to defense counsel's challenge to the relevancy of the evidence, the court found petitioner's silence showed a consciousness of guilt or a guilty knowledge. (Pet. App. 28-29.) Defense counsel did not ask for any limiting instructions about the silence evidence.

The prosecutor then asked Officer Bambrick what petitioner say or do in response to the officer's questions. The officer testified petitioner did not respond and "just kind of stared straight ahead." (Pet. App. 30.) The officer then testified that he handcuffed petitioner and placed him in the back of the patrol vehicle. (Pet. App. 31.) During her lengthy closing arguments, the prosecutor briefly mentioned petitioner's prearrest silence and told the jury that petitioner's nervous conduct and silence at the time of the traffic stop was inconsistent with the behavior of an innocent person. (Pet. App. 33-34.)

On direct appeal, petitioner claimed the prosecution's evidence and comments about his prearrest silence violated his Fifth Amendment rights. (Pet. App. 12-13.) In its unpublished opinion, the California Court of Appeal rejected this claim as follows,

> Raff was not under arrest and Officer Bambrick *was not investigating, nor was he even aware of, the robberies for which Raff was standing trial.* There is a split in the federal courts regarding whether the Constitution is violated when the prosecution comments on a defendant's

> silence occurring before his arrest and before he received *Miranda* warning, and uses that silence to argue consciousness of guilt. [Citation omitted.] [¶] But the cases finding a constitutional violation all involve questioning that occurred during the investigation of the charged offense. Raff cites no authority, nor have we found any, that the government violates the Constitution when it comments on the defendant's silence during noncustodial questioning unrelated to the crime with which the defendant is charged. Officer Bambrick did not ask Raff about or accuse him of any criminal behavior, and was unaware of the robberies. [Citation omitted.] The trial court properly admitted the evidence that Raff was silent when questioned after the traffic stop.

(Pet. App. 13-14.) (Italics in original.) The California Supreme Court denied review. (Pet. App. 22.)

REASONS WHY THE WRIT SHOULD BE DENIED

According to petitioner, this case presents an important question of Fifth Amendment jurisprudence left undecided by this Court in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980): Can the State, in its case-in-chief, elicit testimony that a nontestifying defendant remained silent in the face of police questioning and affirmatively argue to the jury that this prearrest silence is evidence of guilt? (Pet. at 12.) Petitioner further asserts there is a conflict among the federal and state courts on the admissibility of prearrest silence as substantive evidence of guilt. (Pet. at 18-24.) Ultimately, petitioner asks this Court to grant certiorari and to reach the following holding: "the prosecution is forbidden from eliciting any testimony in [its] case-

in-chief or making any comment to the jury on the 'accused's silence' in the face of official questioning as affirmative evidence of guilt whether the 'right to remain silent' was exercised inside or outside of the courtroom, before or after *Miranda* warnings are given." (Pet. at 26.)

The petition should be denied for several reasons. First, petitioner has failed to show a genuine split of authority among the lower courts as to the crucial legal issue raised in this case, i.e., whether the prosecution could use as substantive evidence of guilt a non-testifying defendant's prearrest silence in response to non-accusatory police questioning unrelated to the charged offenses. Consequently, this case does not present a proper vehicle for resolving any alleged split of authority among the lower courts as to the constitutional issue left unresolved in *Jenkins*. Second, the California Court of Appeal correctly found no constitutional impediment to the admission of evidence and comment about petitioner's silence during noncustodial, non-accusatory police questioning unrelated to the charged crimes. For this Court to expand the exclusionary protections of the Fifth Amendment to the instant factual scenario would be unwarranted by this Court's precedents. Third, the opinion below was unpublished and lacks precedential value. Fourth, the challenged evidence was not a significant aspect of the prosecution's case and, as such, any alleged error would be clearly harmless in light of the evidence presented at trial. Thus, a resolution of the legal issue is not necessary herein. Accordingly, there are no compelling reasons for granting certiorari in this case.

I. THERE IS NO SPLIT OF AUTHORITY AMONG LOWER COURTS AS TO THE CRUCIAL LEGAL ISSUE RAISED BY THE UNIQUE FACTUAL SCENARIO HEREIN, AND THIS CASE DOES NOT PROVIDE AN ADEQUATE VEHICLE FOR RESOLVING THE ALLEGED CONFLICT ABOUT THE USE OF A DEFENDANT'S PREARREST SILENCE

As explained below, this Court has yet to rule on the specific issue of whether the prosecution could use a non-testifying defendant's prearrest silence as substantive evidence of guilt. Also, there is an apparent disagreement among the lower courts on the use of this prearrest silence. But this disagreement may be explained to a large extent by the different factual scenarios addressed by the courts. More importantly, there is no conflict or split of authority as to the crucial legal issue raised by the unique facts of this case, in which petitioner's prearrest silence was in response to brief, non-accusatory police questioning about a matter unrelated to the charged offenses. Thus, even if there were a split of authority among lower courts as to the issue left unresolved in *Jenkins*, this case does not provide an adequate vehicle to resolve such conflict.

A. Pertinent Law As to the Right to Remain Silent

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that a defendant's choice not to testify at trial cannot be used against the defendant as evidence of guilt either by the prosecutor in closing argument or the court in jury instructions. This Court reasoned the defendant should not be penalized for exercising a constitutional privilege. *Id.* at 613-15.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held "certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence." *Dickerson v. United States*, 530 U.S. 428, 431-32 (2000). The *Miranda* Court further stated the prosecution may not use at trial the silence of a defendant who exercises his Fifth Amendment privilege during a police custodial interrogation and stands mute in the face of accusation. *Miranda*, at 468 n.37.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court applied the exclusionary rule set forth in *Miranda*'s footnote 37 and barred the impeachment use of a defendant's post-arrest, post-*Miranda* silence, because the *Miranda* warnings contained an implicit assurance that silence will not carry a penalty and it would be fundamentally unfair and a deprivation of due process to penalize the defendant for relying on the government's assurances. *Id.* at 616-20; *see also Wainwright v. Greenfield*, 474 U.S. 284, 289-95 (1986) (*Doyle* reasoning applies to substantive use of a defendant's post-arrest, post-*Miranda* silence).

This Court subsequently refused to extend *Doyle* to cases involving a defendant's pre-*Miranda* silence. *Fletcher v. Weir*, 455 U.S. 603, 604-07 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980). In *Jenkins*, this Court found the use of prearrest silence to impeach a defendant's credibility did not violate the Fifth Amendment or the fundamental fairness guaranteed by the Fourteenth Amendment, as no governmental action induced the defendant to remain silent before arrest. *Jenkins*, at 235-41. The *Jenkins* Court clarified that the probative value of prearrest silence is a question of state evidentiary law. *Id.* at 240. But the *Jenkins* Court did not consider whether or under what circumstances

prearrest silence may be protected by the Fifth Amendment. *Id.* at 236 n.2.

Relying on *Jenkins*, this Court in *Fletcher* reversed the lower court's broadening of *Doyle* to a defendant's post-arrest silence and clarified that *Doyle* applies only to cases where the government had induced silence by implicitly assuring the defendant in the *Miranda* warnings that his silence would not be used against him. *Fletcher*, 455 U.S. at 606; *Jenkins*, 447 U.S. at 240. Thus, in "the absence of the sort of affirmative assurances embodied in the *Miranda* warnings," there is no constitutional violation in permitting cross-examination as to prearrest or post-arrest silence when a defendant chooses to testify. *Fletcher*, at 607.

The Fourth, Fifth, Ninth, and Eleventh Circuits, as well as some state courts, have allowed the use of a non-testifying defendant's prearrest silence as substantive evidence of guilt. *See, e.g.*, *United States v. Salinas*, 480 F.3d 750, 757 (5th Cir. 2007) (*Doyle* rationale applies only to post-*Miranda* silence); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (prearrest silence does not implicate *Doyle*, *Griffin*, Fifth Amendment, or Due Process Clause, because the constitutional privilege against compelled self-incrimination does not come into play); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (Fifth Amendment does not preclude evidence or comment on a defendant's prearrest silence that was not induced by nor a response to government action); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991) (government may comment on a defendant's pre-*Miranda* silence, regardless of whether defendant was arrested); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (officer's testimony regarding defendant's pre-*Miranda* silence was properly

admitted); *State v. Kinder*, 942 S.W.2d 313, 326 (Mo. 1996) (prearrest silence may be used as evidence of consciousness of guilt); *State v. Leecan*, 504 A.2d 480, 484-85 (Conn. 1986) (no constitutional impediment to use of prearrest silence as evidence of guilt); *State v. Helgeson*, 303 N.W.2d 342, 348-49 (N.D. 1981) (defendant's silence in response to a prearrest accusation did not implicate the Fifth Amendment).

Other circuits and state courts have held the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. Although recognizing the *Doyle* due process rule is inapplicable to pre-*Miranda* silence, these courts instead believe the *Griffin* rule (which prohibits the prosecution from referring to the defendant's failure to testify at trial) applies to a non-testifying defendant's prearrest silence. According to those authorities, the privilege against self-incrimination may be asserted by a suspect who is questioned during the investigation of a crime, and a suspect's silence in the face of such questioning is akin to an invocation of the Fifth Amendment privilege against self-incrimination. *See, e.g., Combs v. Coyle*, 205 F.3d 269, 279-86 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1565-68 (1st Cir. 1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1015, 1017-18 (7th Cir. 1987); *State v. Leach*, 807 N.E.2d 335, 339-42 (Ohio 2004); *State v. Easter*, 922 P.2d 1285, 1290-92 (Wash. 1996); *State v. Rowland*, 452 N.W.2d 758, 762-63 (Neb. 1990); *State v. Fencl*, 325 N.W.2d 703, 710-11 (Wis. 1982).[2]

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[2] Many of the state cases cited by petitioner actually avoided the Fifth Amendment issue and, instead, excluded the evidence on state law grounds. *See, e.g., People v. Welsh*, 80

(continued...)

B. The Unique Circumstances of Petitioner's Silence Set This Case Apart from Those Finding a Fifth Amendment Violation

As expressly found by the California Court of Appeal (Pet. App. 13-14), the instant case turns on its facts and is distinguishable from, and therefore not in conflict with, cases finding a Fifth Amendment violation as a result of the prosecution's use of a defendant's prearrest silence as substantive evidence of guilt. Here, petitioner was not a suspect of any crime at the time of the traffic stop, the questioning was unrelated to the charged crimes, and petitioner could not have understood the questions to be part of a criminal investigation into the robberies charged herein. Officer Bambrick's two innocuous questions were directed at Bowen's driving and were pertinent to the subject of the traffic stop. Officer Bambrick was unaware that petitioner and Bowen had committed the charged robberies and knew only that petitioner was a passenger in the car and was not wearing a seat belt. There was no indication or implication in the questions that petitioner had anything to do with Bowen's decision to flee with the police in pursuit.

Also, there was nothing in the questioning, or the surrounding circumstances, that would have led to the conclusion that petitioner felt he was being interrogated about the robberies and that, consequently, he was invoking his Fifth Amendment right to remain silent. As found by the trial court (Pet. App. 28), the questions were not designed to elicit an

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(...continued)
P.3d 246, 306-08 (Colo. 2003); *Landers v. State*, 508 S.E.2d 637, 638 (Ga. 1998); *Tortolito v. State*, 901 P.2d 387, 389-90 (Wyo. 1995); *People v. De George*, 541 N.E.2d 11, 12 (N.Y. 1989).

incriminating response about the charged robberies, as they focused on Bowen's driving and petitioner was just a passenger in the car.

No court has found a Fifth Amendment violation without first being certain the facts surrounding the prearrest silence showed the defendant had either explicitly or implicitly (i.e., by remaining silent) invoked his right to remain silent with respect to the charged crimes. In those cases resulting in a Fifth Amendment violation, officers were investigating the charged crimes, the defendants were possible suspects, the questioning was related to the charged crimes, and it was clear from the facts that the defendants did not want to talk to the police about the charged crimes. The courts concluded that, after a defendant had exercised his right to remain silent and had continued to exercise this right throughout trial, it was impermissible for the prosecution to present evidence or comment about the defendant's "silent" invocation of the Fifth Amendment rights. *See, e.g.*, *Combs*, 205 F.3d at 279-86 (defendant stated, "Talk to my lawyer," when questioned at gunpoint by officer about charged crime and after being placed in custody); *Burson*, 952 F.2d at 1200-01 (defendant refused to respond to I.R.S. investigators' questions about his tax affairs during the course of a criminal investigation); *Coppola*, 878 F.2d at 1565-68 (defendant, who was considered a suspect, told investigating officers he was not going to confess and would not talk without a lawyer); *Lane*, 832 F.2d at 1015, 1017-18 (defendant told police he did not want to talk about the murders); *Leach*, 807 N.E.2d at 336-37 (defendant told investigating officers he wanted to speak to an attorney before answering the officers' questions); *State v. Dunkel*, 466 N.W.2d 425, 438 (Minn. App. 1991) (use of counseled prearrest, pre-

Miranda silence in the state's case-in-chief was erroneous, since it was akin to post-*Miranda* silence); *Fencl*, 325 N.W.2d at 710 (defendant told investigating officer he did not want to be interviewed before talking to his lawyer).

In contrast to those cases resulting in Fifth Amendment violations, the facts herein do not raise a reasonable inference that petitioner, who was not a suspect in any crime, invoked his Fifth Amendment right to remain silent as to the charged robberies when he failed to respond to innocuous, non-accusatory questioning by the officer about a matter unrelated to the robberies. Under the particular circumstances of this case, petitioner's silence was not akin to an invocation of his Fifth Amendment right to remain silent as to the charged crimes. Lacking this fundamental aspect or prerequisite of a Fifth Amendment violation (i.e., a defendant's explicit or implicit invocation of a Fifth Amendment right), petitioner's prearrest silence does not implicate the Fifth Amendment even under the reasoning of those cases barring the use of a defendant's prearrest silence.[3]

In sum, the underlying decision in this case does not conflict with the cases finding a Fifth Amendment violation from the use of a defendant's prearrest silence, since this case involves a unique factual scenario materially distinguishable from those cases. In other words, the outcome of this case

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[3] The Sixth Circuit (which otherwise has taken a position against the use of prearrest silence as evidence of guilt) declined to find a constitutional violation with respect to trial testimony about a defendant's exercise of his right to remain silent in the face of investigatory questioning, where the silence did not relate to the matter for which the defendant was charged and tried. *United States v. Ahmed*, 472 F.3d 427, 435 (6th Cir. 2006).

would be unaffected by a resolution of the asserted conflict or split of authority among lower courts concerning the application of *Griffin* to prearrest silence. In addition, the instant case involves an unpublished opinion of an intermediate state court that lacks precedential value and that avoided addressing the broad legal issue raised by petitioner. For the foregoing reasons, this case presents a very poor vehicle for this Court to resolve the apparent split of authority on the broader issue left unresolved in *Jenkins*.

Furthermore, the apparent conflict or split of authority among courts on the use of prearrest, pre-*Miranda* silence could be explained to a large extent by the different factual scenarios presented in those cases. As demonstrated by the cases cited above, courts have been more willing to find a constitutional violation where the police questioning focused on the charged crimes and the defendant stated or clearly implied he did not want to talk to law enforcement about the crimes. In contrast, courts have declined to find a Fifth Amendment violation where the defendant was not questioned by police about the charged crimes and simply remained silent or did not come forward with information about the crimes. Also, as noted in footnote 2, *ante*, many state courts have declined to rule on the Fifth Amendment issue and, instead, have focused on the state evidentiary issues, such as probative value. Ultimately, this case, with its unique factual scenario, is an even less appropriate case to resolve any issue left unaddressed by *Jenkins*.

II. The State Court Correctly Found No Constitutional Impediment to the Use of Petitioner's Prearrest Silence in Response to Non-Accusatory Questioning Unrelated to the Charged Offenses

As noted above, the state decision herein did not take a definite position on the broad issue of whether or under what circumstances the use of a defendant's prearrest silence as substantive evidence of guilt may violate the Fifth Amendment. Instead, the court correctly found no precedent for barring evidence and comment about petitioner's prearrest silence under the unique circumstances of this case. Nevertheless, petitioner now seeks certiorari to ask this Court for an exclusionary rule that would prevent the use of a defendant's prearrest silence even under the circumstances of this case. There is no precedent for petitioner's overly broad interpretation of the Fifth Amendment, and this Court should refuse his invitation to expand its holding in *Griffin* to the circumstances of this case.

There is no conflict among the lower courts that *Doyle* is inapplicable to pre-*Miranda* silence. As this Court clarified in *Fletcher* and *Wainwright*, the *Doyle* rule applies only to cases where the government has induced the silence by implicitly assuring the defendant in the *Miranda* warnings that his silence would not be used against him. *Wainwright*, 474 U.S. at 291-93; *Fletcher*, 455 U.S. at 606; *see also Greer v. Miller*, 483 U.S. 756, 763 (1987). As this Court has explained, "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright*, at 292. In other words, a *Doyle* violation

presupposes that a defendant had a constitutional right to remain silent and that the defendant had been implicitly or explicitly assured his silence will not be used against him at trial. But it is only the right to remain silent after the *Miranda* warnings that is of constitutional dimension. *Id.* at 293; *United States v. O'Keefe*, 461 F.3d 1338, 1347 (11th Cir. 2006) ("there can be no *Doyle* violation until after a person is given *Miranda* warnings and the assurances implicit therein").

This Court's Fifth Amendment jurisprudence does not support the position that *Griffin* applies to the prosecution's use of a defendant's prearrest, pre-*Miranda* silence as substantive evidence of guilt, especially under the particular circumstances of this case. *Griffin*, which preceded but was not relied upon by *Doyle*, involved comment on a defendant's failure to testify at trial and did not purport to address the propriety of prosecutorial comment on a defendant's pretrial silence. *Griffin*, 380 U.S. at 613-15. In *Miranda*, this Court extended the Fifth Amendment protections to a defendant who stands mute or claims his privilege against self-incrimination "in the face of accusation" when the defendant is "under police custodial interrogation." *Miranda*, 384 U.S. at 468 n.37. Subsequently, *Doyle* and *Wainwright* established exclusionary rules against the use of post-arrest, post-*Miranda* silence. *Wainwright*, 474 U.S. at 289-95; *Doyle*, 426 U.S. at 616-20. *Fletcher* and *Jenkins* clarified *Doyle* and its progeny do not apply to cases involving a defendant's pre-*Miranda* silence, when the evidence is presented to impeach the defendant's testimony. *Fletcher*, 455 U.S. at 604-07; *Jenkins*, 447 U.S. at 239-40.

Whereas *Griffin* concerned a defendant's right to remain silent at trial, *Miranda* and *Doyle* specifically dealt with the right to remain silent prior

to trial and identified a defendant's arrest or custodial questioning as the triggering event for the Fifth Amendment protections. Prior to arrest, a defendant is not entitled to receive any assurance that his silence would not be used against him at a trial and cannot invoke his *Miranda* rights "anticipatorily," even if the defendant may decline to answer an officer's questions. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (persons temporarily detained pursuant to traffic stops are not "in custody" for *Miranda* purposes); *see also McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) ("We have in fact never held a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'"). In other words, the defendant's prearrest silence does not possess the same constitutional dimension as post-arrest, post-*Miranda* silence or a defendant's decision not to testify at trial, and may be used as evidence of guilt at trial. *See Wainwright*, 474 U.S. at 293 ("The right of silence after *Miranda* warnings is of constitutional dimension"); *Zanabria*, 74 F.3d at 593 (Fifth Amendment "protects against compelled self-incrimination but does not . . . preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference").

In his concurring opinion in *Jenkins*, Justice Stevens pointed out that a defendant's decision not to testify at trial and a defendant's silence in a prearrest context "are fundamentally different" situations, which are not "constitutionally indistinguishable." (*Jenkins*, 447 U.S. at 241 (Stevens, J., concurring). As Justice Stevens explained,

> In the trial context it is appropriate to presume that a defendant's silence is an

exercise of his constitutional privilege and to prohibit any official comment that might deter him from exercising that privilege. For the central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial. Moreover, since a defendant's decision whether to testify is typically based on the advice of his counsel, it often could not be explained without revealing privileged communications between attorney and client. [¶] These reasons have no application in a prearrest context. The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment ["No person . . . shall be compelled in any criminal case to be a witness against himself"]. . . . Consequently, I would simply hold that the admissibility of petitioner's failure to come forward with the excuse of self-defense shortly after the stabbing raised a routine evidentiary question that turns on the

> probative significance of that evidence and presented no issue under the Federal Constitution.

Id. at 242-44 (footnotes omitted).

Under the particular circumstances of this case, there was no constitutional impediment to the use of petitioner's prearrest, pre-*Miranda* silence as substantive evidence of guilt. First, petitioner's silence lacked "constitutional dimension," since petitioner was simply detained as part of a traffic stop, was not subjected to custodial questioning, and was not entitled to invoke his *Miranda* rights "anticipatorily." *See McNeil*, 501 U.S. at 182 n.3; *Berkemer*, 468 U.S. at 440. It is irrelevant whether the officers intended to detain or arrest petitioner at the time of the questioning, as the officers' subjective intentions were not communicated to petitioner. *Berkemer*, at 442. Ultimately, the officers were permitted to ask petitioner questions pertinent to the traffic stop without having to warn him about his *Miranda* rights. But petitioner was not under official compulsion to answer any questions prior to his arrest. *Id.* at 439-40. Under these circumstances, the Fifth Amendment was not implicated. *See Jenkins*, 447 U.S. at 242-44 (Stevens, J., concurring).

Second, unlike the defendants in *Doyle* or *Wainwright*, petitioner was not explicitly or implicitly assured by the officers that his silence would not be used against him at trial. Consequently, there was no fundamental unfairness in the use of his silence at trial. Third, the circumstances surrounding petitioner's silence do not support a reasonable inference that he actually invoked his right to remain silent as to the charged crimes prior to his arrest. As already shown, petitioner was just a passenger in a car stopped for traffic violations, was not interrogated about the

charged crimes, and had no reason to exercise his right to remain silent as to the charged crimes. The officer's questioning involved two innocuous, non-accusatory questions unrelated to petitioner's crimes. Even though in retrospect the failure to respond was probative on guilty knowledge, there still was no reason for petitioner to believe the questions, on their face, called for an incriminating answer. Thus, unlike the defendants in *Griffin*, *Doyle*, and *Wainwright*, petitioner did not actually invoke his constitutional right to remain silent as to the charged crimes, even if he were entitled to do so, and his prearrest silence was not protected by the Fifth Amendment.

Accordingly, the state court correctly denied petitioner's claim of error. This Court should not grant certiorari to adopt petitioner's proposed rule of law, which would broadly expand the scope of *Griffin* to a factual scenario never accepted by this or any other court. *See, e.g.*, *McNeil*, 501 U.S. at 182 (guidelines for judicial review should be "clear and unequivocal . . . but only when they guide sensibly and in a direction we are authorized to go"; declining to expand the Sixth Amendment right to counsel).

III. The Legal Issue Need Not Be Resolved Because the Opinion Below Lacks Precedential Value and the Alleged Error Was Harmless

Finally, certiorari should be denied because the legal question raised by petitioner need not be resolved herein. As previously noted, the opinion below was not issued by the state's highest court, was unpublished, and lacks any precedential value. Moreover, the alleged error was harmless beyond a reasonable doubt, in light of the strong evidence of guilt presented at trial and the minimal role played

by the challenged evidence and comment at trial. *See Chapman v. California*, 386 U.S. 18, 24 (1967). In other words, it is not important for this Court to resolve the question presented because it would make no difference to the legal landscape or the outcome of the case.

Petitioner's silence was not a significant aspect of the prosecution's case. For example, the challenged testimony covered less than one page of the lengthy trial transcript, and the prosecutor mentioned very briefly petitioner's silence during his closing arguments (in less than ten lines of about forty-seven pages). The prosecutor presented other unchallenged evidence of consciousness of guilt, such as petitioner's nervous conduct at the time of the traffic stop and his throwing of the handgun, which was used in the robberies, out of the car during the police pursuit. Certainly, petitioner's attempt to dispose of the handgun was far more significant and probative than his failure to respond to two questions unrelated to the charged crimes.

Furthermore, the evidence against petitioner was overwhelming. The victims' identification testimony unquestionably was the most significant aspect of the prosecution's case. Petitioner was identified at trial by both Gomez and Tifford, who expressed no doubts about their identifications. At the time of the robbery, Gomez was able to see petitioner's face from up close for several minutes, and the area was well lit. Although Gomez initially described the robber as older and smaller than petitioner, Gomez explained he was uncertain about the size and age of the robber because the robber was wearing a hooded sweatshirt. After having the opportunity to see petitioner from close range and standing up at trial, Gomez verified his identification. Gomez also selected petitioner from a

photographic lineup days after the robbery and identified him at the preliminary hearing. In contrast, Gomez was certain Bowen was not the robber.

At trial, Tifford identified petitioner without a doubt, despite petitioner's change of appearance between the robbery and trial. To the police, Tifford described the robber as "perhaps Hispanic" or a light-skinned Black, about 5'10", twenty to thirty years old, and 150 pounds. Tifford initially speculated the robber could be Black because of the slang used by the robber. Tifford testified petitioner could be Hispanic in his appearance and looked in his twenties. Tifford identified petitioner from a photographic lineup and at the preliminary hearing. He excluded Bowen as the robber at preliminary hearing and trial. At trial, Tifford still had a "very strong" mental image of the robber. According to the investigating officer, petitioner was much heavier at the time of trial than on May 21, 2006, which explained the discrepancies in the victims' testimony about his weight. Moreover, the identification testimony of Gomez and Tifford was cross-corroborative, as petitioner used a similar modus operandi during both robberies.

Aside from the eyewitness identification testimony, petitioner was in the car with Bowen when they were stopped by the police. The police stop occurred approximately an hour after the Silverman robbery was committed. Bowen had Silverman's driver's license in his pocket. The gun petitioner threw from the car was the weapon used in the crimes. Many items found in the car, such as the hooded sweatshirts, directions, bandanna, Tifford's wallet, social security card, and medical card, all linked petitioner and Bowen to the robberies. Further, petitioner had sent a text message to a

friend listing the items that were taken from Silverman and/or Tifford. Silverman identified Bowen as the person who robbed him. The above evidence overwhelmingly established petitioner personally perpetrated two robberies and assisted Bowen in the commission of a third robbery. All petitioner could offer against this overwhelming evidence of guilt was his mother's alibi testimony. Not surprisingly, it took the jury little over two hours to find petitioner guilty of all charges and special allegations.

In sum, any error in admitting evidence and argument at trial about petitioner's silence in response to Officer Bambrick's questions at the time of the traffic stop was harmless beyond a reasonable doubt. And this Court therefore need not resolve the legal question presented by petitioner, which is irrelevant to the ultimate outcome of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: May 12, 2010

Respectfully submitted

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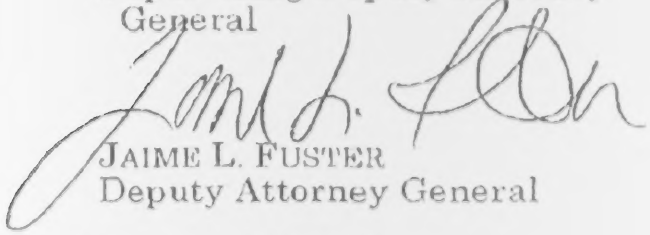

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